

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

11 ANDREY LARSHIN,

No. 2:21-cv-0122 JAM KJN P

12 Petitioner,

13 ORDER

14 v.

15 J. PICKKET,

16 Respondent.

17 Petitioner, a state prisoner, proceeds pro se with an application for writ of habeas corpus  
18 pursuant to 28 U.S.C. § 2254. Respondent filed a motion to dismiss this action alleging the  
19 petition was successive, untimely, included an unexhausted claim, and failed to raise a cognizable  
20 federal claim. On September 9, 2021, respondent withdrew the argument that the instant petition  
21 was successive. The motion to dismiss is fully briefed. As discussed below, the court is required  
22 to provide petitioner additional information before ruling on the pending motion.

23 Exhaustion Standards

24 The exhaustion of state court remedies is a prerequisite to the granting of a petition for  
25 writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived  
26 explicitly by respondents' counsel. 28 U.S.C. § 2254(b)(3).<sup>1</sup> A waiver of exhaustion, thus, may

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28 <sup>1</sup> A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C.  
§ 2254(b)(2).

1 not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the  
2 highest state court with a full and fair opportunity to consider all claims before presenting them to  
3 the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d  
4 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986). In other words, in order to fully  
5 exhaust his state court remedies, petitioner must have presented each and every claim set forth in  
6 his federal petition in a petition filed in the California Supreme Court.

7 Federal Amended Petition

8 In his amended petition, petitioner raised three claims: (1) the state court erred in  
9 denying his petition for resentencing under Senate Bill 620; (2) the trial court exceeded its  
10 jurisdiction based on clearly established statutes and laws, both state and federal, specifically  
11 citing California Penal Code § 12022.5(a)(1), and arguing his sentence is excessive; and (3)  
12 petitioner's sentence was miscalculated. (ECF No. 6.)

13 Petition Filed in the California Supreme Court

14 In the habeas petition filed in the California Supreme Court, petitioner raised two claims:  
15 (1) ineffective assistance of counsel; and (2) the imposition of upper term sentences was  
16 excessive in violation of Cunningham v. California, 549 U.S. 270 (2007), and Apprendi v. New  
17 Jersey, 530 U.S. 466 (2000). (ECF No. 16-18 (LD 15).)

18 Discussion

19 In his opposition to the motion to dismiss, petitioner argues he sustained ineffective  
20 assistance of counsel (ECF No. 18 at 3-4), which was a claim he raised in the California Supreme  
21 Court but did not include in his first amended petition. It is unclear whether petitioner intended to  
22 include his ineffective assistance claim in his federal petition, but his arguments suggest that he  
23 did. Therefore, petitioner is granted thirty days in which to file a motion to amend, along with his  
24 proposed second amended petition in which he raises all claims he intends to pursue in this  
25 action. If he intended to pursue such ineffective assistance of counsel claim, he must include it in  
26 any proposed amended petition, and explain in his motion to amend why he did not previously  
27 include it. If petitioner did not intend to pursue his ineffective assistance of counsel claim, he is  
28 not required to amend, and this action will proceed on his first amended petition.

1           In addition, petitioner's third claim in his first amended petition (ECF No. 6) was not  
2 included in the petition filed in the California Supreme Court. Because such claim was not  
3 included, this court is required to inform petitioner of his options, and will do so before ruling on  
4 the pending motion to dismiss. See Jefferson v. Budge, 419 F.3d 1013, 1016 (9th Cir. 2005); see  
5 also Butler v. Long, 752 F.3d 1177, 1181 (9th Cir. 2014), as amended on denial of reh'g and  
6 reh'g en banc, (June 24, 2014) (per curiam) (district court erred in dismissing the mixed habeas  
7 petition without first giving petitioner the opportunity to amend his petition to include only  
8 exhausted claims). Petitioner may file a motion to stay the case so that he may return to state  
9 court and exhaust his third claim, or petitioner may abandon the unexhausted third claim and  
10 pursue only the exhausted claims in federal court.

11           Federal law recognizes two different procedures that a prisoner may use to stay a federal  
12 habeas action. See Rhines v. Weber, 544 U.S. 269 (2005) (staying timely mixed petition);<sup>2</sup> Kelly  
13 v. Small, 315 F.3d 1063 (9th Cir. 2003) (allowing prisoner to dismiss unexhausted claims and  
14 stay action as to exhausted claims subject to potential later amendment of petition), overruled on  
15 other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007). Prisoners seeking a stay  
16 under Kelly must first dismiss any unexhausted claim from the federal petition.

17           If petitioner chooses to abandon the unexhausted third claim and pursue only the  
18 exhausted claims in federal court, he should omit such unexhausted claim from any amended  
19 petition submitted along with the motion to amend referenced above.

20           Accordingly, IT IS HEREBY ORDERED that:

21           1. Petitioner is granted thirty days in which to file a motion to amend, along with an  
22 amended petition that includes all of the claims he intends to pursue in this action. If petitioner  
23 does not file a motion to amend, this action will proceed on his first amended petition (ECF No.  
24 6), and his ineffective assistance of counsel claim will not be considered.

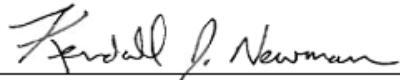
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26           <sup>2</sup> In limited circumstances, a district court may stay a mixed petition pending exhaustion of  
27 unexhausted claims if: (1) the petitioner had good cause for his failure to exhaust; (2) his  
28 unexhausted claims are potentially meritorious; and (3) there is no indication that the petitioner  
engaged in intentionally dilatory litigation tactics. Id., 544 U.S. at 278. Each of these three  
conditions must be satisfied to obtain a stay under Rhines. Id.

1           2. Petitioner is granted thirty days in which to file a motion for stay or request to abandon  
2 unexhausted claim three. If petitioner fails to file such motion or respond to this order,  
3 petitioner's third claim will be dismissed as unexhausted.

4 Dated: October 12, 2021

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6 KENDALL J. NEWMAN  
7 UNITED STATES MAGISTRATE JUDGE

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